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Supreme Court, U.S.
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No. 94-0309

In The

Supreme Court of the United States

October Term, 1994

LOIS LAMB and CHARLTON LAMB,

Petitioners,

vs.

VILLAGE OF QUINCY,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals, Logan County, Ohio, Third Appellate District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Respondent Village of Quincy is satisfied with the questions presented by Petitioners.

PARTIES TO PROCEEDINGS

Respondent Village of Quincy agrees with the list of parties presented by Petitioners, with the following correction.

The trial court entered an order joining "MEDICARE/ Nationwide Mutual Insurance Co." as a party to the action. Notice of the joinder and a copy of the complaint were sent by the court to MEDICARE/Nationwide Mutual Insurance Company. However, the Healthcare Financing Administration ("HCFA"), the Department of Health and Human Services ("HHS"), and the United States Attorney General and the United States Attorney for the district in which the action was brought were not provided notice. Therefore, the federal government was not properly joined as a party. (Court of Appeals Opinion, A-13).

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OPINIONS BELOW

Respondent Village of Quincy concurs with Petitioners' recitation of the opinions and judgments delivered by the courts below.

STATEMENT OF JURISDICTION

Respondent Village of Quincy has no objection to Petitioners' summary of the basis for jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent Village of Quincy is satisfied with Petitioners' statement of constitutional and statutory provisions which are involved in this case.

STATEMENT OF THE CASE

This case arises from a trip and fall accident occurring in April, 1990, when Petitioner Lois Lamb stepped down from a curb in the Village of Quincy and injured her left knee.

Prior to trial, the Village of Quincy moved and the trial court entered an order joining Medicare/Nationwide Mutual Insurance Company as a party to the action. Nationwide Mutual Insurance Company was the intermediary through which MEDICARE made payments to Mrs. Lamb's health care providers. (Court of Appeals Opinion, A-11, A-15). Notice of the joinder and a copy of the complaint were sent by the court to Medicare/Nationwide Mutual Insurance Company. However, the Secretary of HHS, HCFA, and the United States Attorney General and the United States Attorney for the district in which the action was brought were not provided a notice of joinder and copy of the complaint. Therefore, the federal government was not properly joined as a party based on lack of proper service. (Court of Appeals Opinion, A-11, A-12).

The case proceeded to jury trial on April 21, 1993, with the jury determining that Petitioner sustained $30,000 in damages. Pursuant to Ohio's comparative negligence statute, the jury apportioned negligence, finding the Village of Quincy to be 60% at fault and Mrs. Lamb to have been 40% at fault. The trial court therefore reduced the $30,000 verdict by 40%. The trial court also found from the evidence that Medicare paid Mrs. Lamb's health care providers the sum of $13,573.01 and pursuant to Ohio Revised Code § 2744.05, deducted this amount from the award against the Village of Quincy. Final judgment was therefore entered in favor of Petitioners in the amount of $4,426.99. (Judgment Entry, Trial Court, A-1, A-3; Court of Appeals Opinion A-5, A-6, A-12, A-15).

Petitioners appealed to the Third Appellate Judicial District of Ohio, Lucas County. In summary, the Third District Court of Appeals found as follows:

1. The judgment of the trial court makes Medicare the primary payer only if Medicare cannot recover the funds from the tortfeasor.

2. Ohio Revised Code § 2744.05 (A-27, A-28) provides the statutory framework for liability of Ohio political subdivisions. The first part of the statute mandates that the collateral source rule is abrogated as to a political subdivision. The second part of the Code section abolishes the insurer's right of subrogation against a political subdivision.

3. Medicare's Secondary Payer Statute, specifically 42 U.S.C. § 1395y(b)(2)(A) (A-22), does not preempt Ohio's abrogation of the collateral source rule in suits against political subdivisions, as Congress did not expressly state an intent to preempt state law. Ohio's law does not interfere with an application of this portion of the federal statute, as the federal government can collect against the political

subdivision, and "[w]e find no compelling reason or authority to allow appellants to be the stakeholder of the money which the federal government may require be paid back to Medicare." (Court of Appeals Opinion, A-5, A-10).

4. The second part of R.C. § 2744.05(B) preventing insurers from asserting subrogation rights against government tortfeasors has been preempted by the federal government's statutory right to seek reimbursement from Medicare benefits.

5. The federal government was not properly joined as a party and the trial court erred by finding it estopped from seeking reimbursement of the funds paid out by Medicare. (Court of Appeals Opinion, A-13).

The Village of Quincy agrees with the other "facts" contained in Petitioners' statement of the case, but takes exception to the arguments contained in Petitioners' statement of the case. Specifically, the Village of Quincy disagrees that Petitioners were obligated under 42 U.S.C. § 1395y(b) (A-18) and 42 C.F.R. § 411.24(h) (A-35) to reimburse Medicare for the $13,573.01, or that the money, when received by Petitioners, is due in full to the United States. (Petition for Writ of Certiorari, p. 3).

As held by the Court of Appeals in this case, the federal government is not estopped from asserting its rights for reimbursement of the funds paid by Medicare from the Village of Quincy. The federal government's rights to subrogation have been preserved. As the Court of Appeals stated:

> . . . Congress did not expressly state an attempt to preempt state law, nor does Ohio's law interfere with an application of this portion of the federal statute. Both statutes can, and do, exist harmoniously without one doing damage to the other.

> By reducing the award against the Village, the Trial Court complied with R.C. 2744.05(B) and its intent to conserve the fiscal resources of political subdivisions. The Congressional objective of Medicare being only a secondary payer was not harmed by the set-off.

(Court of Appeals Opinion, A-10).

> . . . Failure to deduct the amount paid by Medicare makes both Medicare and Quincy primary payers should the federal government decide not to enforce its subrogation rights. This is the result which R.C. 2744.05(B) and Section 1395y(b)(2), Title 42, U.S. Code were specifically intended to avoid. Moreover, failure to make the deduction would violate that part of R.C. 2744.05(B) which has not been pre-empted by federal law. We find no compelling reason or authority to allow appellants to be the stakeholder of the money which the federal government may required be paid back to Medicare.

(Court of Appeals Opinion, A-11).

SUMMARY OF THE ARGUMENT

Medicare does not preempt Ohio Revised Code § 2744.05(B) regarding Ohio's abrogation of the collateral source rule in suits against political subdivisions. Ohio's law does not interfere with the application of 42 U.S.C. § 1395y(b)(2)(A) pertaining to collateral sources, nor does Congress in the Medicare statute express an attempt to preempt state law on this issue. Both statutes can, and do, exist harmoniously without one doing damage to the

other. Preemption therefore does not result in this case. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 104 S. Ct. 615, 78 L. Ed. 2d 443 (1984).

Insofar as R.C. § 2744.05(B) abolishes the subrogation rights of insurers against political subdivisions, the Court of Appeals has found this portion of the statute preempted by the federal government's statutory right to seek reimbursement from a political subdivision of the state for Medicare benefits paid on behalf of the injured party.

The federal government is not a party to the action. The federal government has the right, however, to recover Medicare payments by bringing an action against "any entity," including the Village of Quincy, which is required or responsible to pay under a primary plan. 42 U.S.C. § 1395y(b)(2)(B)(ii). Consequently, the United States government is subrogated to the rights of the Petitioners in this case.

Petitioners, however, do not personally owe the federal government, as they suggest, the amount of Medicare payments made to their health care providers. Petitioners must only cooperate in recovery if sought by the government. They clearly have not received third party payments personally. *See* 42 C.F.R. § 411.24, 42 C.F.R. § 411.26. Further, no Medicare recovery has been made in this case justifying application of 42 C.F.R. § 411.37, as so found by the lower court. The trial court in this case therefore did not err by reducing the jury verdict by the amount which may have to be reimbursed to the federal government.

REASONS FOR DENYING THE WRIT

I.

CONGRESS HAS NOT PREEMPTED OHIO'S ABROGATION OF THE COLLATERAL SOURCE RULE AGAINST POLITICAL SUBDIVISIONS.

The statutory framework for the liability of political subdivisions is contained in Ohio Revised Code, Chapter 2744. A political subdivision may be held civilly liable for personal injuries caused by an act or omission of the political subdivision. (Court of Appeals Opinion, A-7). A political subdivision is granted the immunities set forth in R.C. § 2744.05. There are two immunities in issue in this action. First, the collateral source rule is abrogated as to the political subdivision. The statute requires the court to deduct the collateral benefits from the award recovered by a plaintiff.

The Ohio Supreme Court in its decision of *Menefee v. Queen City Metro,* 49 Ohio St. 3d 27, 29, 550 N.E. 2d 181, 183 (1990), stated that deduction of collateral benefits conserves the fiscal resources of political subdivisions by providing the protection of sovereign immunity when a person injured by the negligence of the political subdivision is compensated by insurance or some other source of reimbursement. The Supreme Court in *Menefee* also upheld the constitutionality of Ohio Revised Code § 2744.05.

The second part of R.C. § 2744.05(B) is no longer in issue, as the Court of Appeals in this case determined that R.C. § 2744.05(B) is preempted insofar as it affects the subrogation rights of the federal government. Therefore, the federal government has the statutory right to seek reimbursement of Medicare benefits received by the injured party in suits against political subdivisions. (Court of Appeals Decision, A-11).

Congress has the power to preempt state law under the supremacy clause of Article IV of the United States Constitution. The Court of Appeals correctly noted instances when preemption occurs as cited in this Court's opinion in *Louisiana Public Service Comm. v. F.C.C.*, 476 U.S. 355, 368-69, 106 S. Ct. 1890, 1898-99, 90 L. Ed. 369, 381-82 (1986). In general, preemption occurs when Congress, in enacting a federal statute, expresses a clear intent to preempt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the states to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.

42 U.S.C. § 1395y(b)(2) reflects that Medicare payments are secondary to other sources of compensation. (A-27). Ohio Revised Code § 2744.05(B) providing for the collateral source rule abrogation as to political subdivisions does not interfere with federal law requiring that Medicare payments be secondary to other sources of compensation. The United States has every opportunity to recover Medicare payments made in this case by bringing an action against the Village of Quincy. Under 42 U.S.C. § 1395y(b)(2)(B)(ii), the United States can recover Medicare payments by bringing an action against any entity which is required or responsible to pay under a primary plan, if it so wishes. If the United States seeks such recovery, the Medicare payments made to Petitioners *are secondary* and will be reimbursed. In the case at issue before this Court, however, the United States is not a party.

Consequently, there is no express provision in the Medicare Act that Congress intended to preempt state law. Ohio's law regarding abrogation of the collateral source rule as to political

subdivisions under R.C. § 2744.05(B) does not interfere with 42 U.S.C. § 1395y(b)(2) regarding collateral sources and recovery. Therefore, "both statutes can, and do, exist harmoniously without one doing damage to the other." (Court of Appeals Opinion, A-10). Ohio's statutory framework and its intent to conserve the fiscal resources of political subdivisions has been met. Further, the congressional aim of Medicare being only a secondary payer is not harmed, as Medicare and the United States government have every right to seek reimbursement under federal law, if they so wish, against the Village of Quincy.

II.

PETITIONERS' PROPERTY RIGHTS HAVE NOT BEEN ABRIDGED.

Petitioners confuse their rights under Medicare versus the rights of the United States government. The United States government (through Medicare) has expended the sum of $13,573.01, not Petitioners. Therefore, the United States government has the right to seek reimbursement of the funds through subrogation, and that right has not been abridged.

Specifically, under 42 U.S.C. § 1395y(b)(2)(B)(i) and (ii), the United States can recover Medicare payments by bringing an action against "any entity" which is required or responsible to pay. (A-22). Under the Code of Federal Regulations cited to this Court by Petitioners, the United States has the right to compromise a claim under 42 C.F.R. § 401.61 (A-32); to require cooperation of any beneficiary in any action, 42 C.F.R. § 411.23 (A-35); to initiate recovery of conditional payments pursuant to 42 C.F.R. § 411.24 (A-35); to intervene in any action pursuant to 42 C.F.R. § 411.26 (A-38); and to waive recovery or compromise claims pursuant to 42 C.F.R. § 411.28 (A-38). The right is the right of the government, and not any individual. Petitioners in this case have no property rights regarding Medicare payments.

Petitioners seem to suggest they should be the ones entitled to recovery for Medicare payments, but this is not the law. As correctly noted by the Court of Appeals in this case, such an argument is not compelling as it would allow Petitioners to be the stakeholder of the money which the federal government may or may not, in its discretion, require to be paid back to Medicare. (Court of Appeals Opinion, A-12).

The argument presented by the Petitioners that "as a beneficiary who has received a third party payment, Mrs. Lamb is required to personally reimburse Medicare, minus procurement costs, within sixty days," (A-36), (Petition p. 9) is clearly error. Petitioners did not receive third party payment under 42 C.F.R. § 411.24(h). It is only where Medicare makes a conditional payment to a health care provider, and then the beneficiary or other party receives a third party payment of the amount paid by Medicare does 42 C.F.R. § 411.24(h) become effective. In this case, no third party payment has been received by anyone and therefore, this section has no application. It must be reiterated again that the United States government was not a party to this case, and therefore this case does not involve any action by the United States government seeking reimbursement of any Medicare payments. The trial court was absolutely correct in reducing the amount of the award of $13,573.01 pursuant to R.C. § 2744.05(B).

Finally, if the United States government wished, it could have intervened in this action, but did not do so. The issues remaining concerning Medicare payments and reimbursement are between the United States and the Village of Quincy. If the United States seeks reimbursement for Medicare payments, it has the right to do so under federal law, and the Court of Appeals so held. That right in no way, however, abridges any right of Petitioners.

CONCLUSION

Ohio's Law, R.C. § 2744.05(b), requiring abrogation of the collateral source rule as to political subdivisions is clearly not preempted by federal law. As regards the individual claimant, the congressional objective of Medicare being only a secondary payer is not harmed by the set-off. The federal government has the opportunity to seek reimbursement from a political subdivision. Therefore, both statutes can, and do, exist harmoniously without one doing damage to the other. The suggestion of Petitioners that there are conflicts between the decisional law in Ohio and federal courts, is simply erroneous. The result reached by the Court of Appeals in this case is correct and sound.

WHEREFORE, for the foregoing reasons, Village of Quincy respectfully requests this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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